BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: BRIAN B., Claimant, vs. REGIONAL CENTER OF ORANGE COUNTY, Service Agency.	OAH No. 2009060853

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 24 and 25, 2010, and March 14, 16, and 17, 2011, in Santa Ana.

Valerie Vanaman, attorney at law at Newman, Aaronson, Vanaman, represented Brian B. (claimant).[1]

Christina M. Doyle, attorney at law at Woodruff, Spradlin & Smart, a P.C., represented the Regional Center of Orange County (RCOC or Service Agency).

Oral and documentary evidence was received. The record was held open until April 11, 2011, to allow the parties to file closing briefs. Claimant filed a closing brief on April 11, 2011; the brief was marked for identification as exhibit C15. The Service Agency filed a closing brief on April 11, 2011; the brief was marked for identification as exhibit SA42. The record was closed on April 11, 2011, but was reopened on April 13, 2011, to receive a reply brief that claimant filed on that date. The reply brief was marked for identification as exhibit C16.

[1] Initials and family titles are used to protect the privacy of claimant and his family.

The record was closed and the matter was submitted for decision on April 13, 2011.

ISSUE

Is claimant eligible to receive services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 22-year-old male.

2. By letter dated May 21, 2009, the Service Agency notified claimant's parents of its determination that claimant is not eligible for regional center services because he does not meet the criteria set forth in the Lanterman Act.

3. On or about June 15, 2009, claimant's father filed a fair hearing request to appeal the Service Agency's determination regarding eligibility. In the fair hearing request, claimant's father specified that claimant should be found eligible on the basis of "autism and/or fift[h] category."

4. The Service Agency held an informal meeting on July 30, 2009, to address the issue of claimant's eligibility. The Service Agency informed claimant's parents by letter dated August 6, 2009, that as a result of the meeting, claimant was to be assessed by Robert Patterson, Ph.D., on behalf of the Service Agency, to "provide us with further information to determine if [claimant's] history and present functioning would qualify him within the 5th category." Dr. Patterson performed a psychological assessment of claimant on September 17, 2009. Based on Dr. Patterson's Psychological Report dated October 14, 2009, the Service Agency again determined, on October 27, 2009, that claimant was not eligible for regional center services.

Claimant's Background

5. Claimant lives at home with his parents and brother.

6. Claimant's routine daily activities are eating, sleeping, and playing video games. His conversation centers on whatever video game he is involved in. He reads, but only material related to his video games. He requires prompting for all personal care activities—bathing, shampooing, brushing his teeth, putting on clean clothes, taking his medications, shopping for food. He cannot cook, but he can heat food in a microwave and make sandwiches. He cannot choose clothing appropriate to the weather; he will stay outside in the rain while wearing gym shorts and a t-shirt, and will not put on a jacket when it is cold. Claimant does not understand that he has personal care problems. Claimant can shop for

video games without assistance but, as he does not understand money or the value of coins, he will give bills to the clerk and not get change. Claimant is unable to obtain a driver's license; he failed the exam. He can grasp only one command at a time, and cannot follow multi-step instructions. He cannot use public transit because he is unable to negotiate transfers and has a problem with change for the fares. Claimant cannot recite the months of the year in order, cannot tell time on an analog clock, and does not understand units of time. He has great difficulty with transitions and with changes in his routine. When he attended school, it was hard to get him out of the house in the morning, even if the school bus was waiting for him. He now only goes to the video store and to family functions.

7. Claimant is unable to participate in social groups outside the family, and has no interest in doing so; he prefers solitary activities. Claimant has no friends. His father testified that he has never had any friends, and has never been able to explore social interactions in the community or at school. He communicates on-line with others who are playing his on-line video game, but he does not meet them personally. Claimant has difficulty initiating conversation, and requires prompting. He slurs his speech and speaks too rapidly to be readily understood. His father testified that claimant exhibits no social or emotional reciprocity.

8. Claimant's father testified that claimant has never been able to work full-time; he begins rocking if he works more than four hours at a time. Claimant worked at Goodwill for approximately three weeks, beginning in June 2010, disassembling computers in a sheltered workshop with other developmentally disabled individuals. He stopped working at Goodwill because he had started rocking before leaving the house for the bus; he continued to rock each day until he quit his job. Goodwill has said it will accept claimant if he wishes to return to work. Prior to working at Goodwill, claimant worked at Vons for about a year, until December 2009; he bagged groceries up to four hours per day, usually only for two or three days per week. There were periods when claimant did not go to work at all. He began rocking while at work and would call home to ask to be picked up. He finally stopped working at Vons because the rocking prevented him from even going to work or getting out of the car. Prior to working at Vons, claimant worked at Staples part-time for about one week. Claimant had trouble being around other people, and had to stop working because he began rocking.

Claimant's Behaviors Prior to the Age of Three

9. Claimant's father testified as follows: Claimant never understood how to play cooperatively. He could not play successfully with other two- or three-year-olds; he would argue with them and leave. He was unable to participate in Gymboree; when his parents sat him down to play with other children, claimant got up, went to the dark side of the room, and refused to play. He did not want to attend preschool or interact with other children; his teachers said he had trouble getting along with other children. He displayed hand-flapping and unusual body posturing as a toddler; for several weeks, he would not walk at all but would somersault through the house. Claimant could not use full sentences, and could not communicate his desires using only language; he used gestures and invented words.

Claimant would not engage in imaginative play. He had action figures, but would only put them in cups with water and freeze them; he would line up his other toys and organize them but would not play with them. He was preoccupied by the vacuum cleaner, and would stare at it and stroke it.

Claimant's Assessments, Treatments by Healthcare Providers, and Schooling

10. Claimant was seen by a family practice doctor, not a pediatrician, until he was seven years old.

11. In October 1996, Dr. Martin Baren, a developmental pediatrician, examined claimant and first diagnosed him with Tourette's syndrome. Claimant has a family history of Tourette's syndrome, of which claimant's parents informed Dr. Baren and the other professionals and school personnel with whom they eventually consulted. Claimant's symptoms were so severe that he would fly out of chairs and spin. His parents wanted providers primarily to address the Tourette's syndrome symptoms because they were so overwhelming. In a letter report of his evaluation dated October 15, 1996, Dr. Baren noted that claimant met almost all of the criteria of Tourette's syndrome except the degree of impairment. Dr. Baren found that Claimant also presented with problems in language functioning, following verbal directions, and making transitions. Dr. Baren further noted that claimant's parents were "not certain about his peer interaction in school" and that they reported that "[h]omework is a nightmare" because claimant would go "off task." They also reported that claimant's early developmental milestones had been "normal," except for "problems with temporal and sequential skills." (Ex. SA6.)

12. In the spring of 1997, on the advice of Dr. Baren and the personnel at the private school claimant was then attending, claimant's parents sought to have him qualify for special education through the local public school. An assessment report generated by public school personnel reflects that claimant was found eligible for special education services "as an Other Health Impaired Child (OHI), due to his broad spectrum behavior disorder (ADHD, ODD, OCD and Tourette's Syndrome)." (Ex. SA7.) Instrumentalities used to assess claimant included the Wechsler Intelligence Scale for Children, Third Edition (WISC III) (the results of which showed claimant to be "in the Bright Normal range") and speech and language tests. The assessment report notes that claimant's parents reported "[s]ignificant concerns in the areas of behavior, i.e. oppositional and defiant," and claimant's teacher reported that claimant "struggles with staying on task and following directions."

13. Claimant began third grade in public school in September 1997. On November 7, 1997, Dr. Baren wrote a letter to the Placentia Yorba Linda Unified School District stating that he had diagnosed claimant with Attention Deficit Hyperactivity Disorder (ADHD) and Obsessive Compulsive Disorder (OCD) in addition to Tourette's disorder. Dr. Baren also noted in the letter that claimant's "motor and vocal tics have severely increased to the point where he can no longer attend school in a class room setting. His symptoms have escalated to cause major impairment." (Ex. SA6A.) No data appears in the record to support the OCD or the ADHD diagnoses. In his report of October 15, 1996, Dr. Baren had found

insufficient evidence to indicate ADHD, but recommended monitoring claimant for symptoms of ADHD.

14. While still in third grade, claimant began receiving special education services through the school district. The school district noted claimant's condition as "Other Health Impaired." (Ex. SA8.) His December 15, 1997, Individualized Education Program (IEP) report noted that claimant's eligibility was based on his diagnosis of Tourette's syndrome. (Ex. SA8.)

15. Dr. Baren referred claimant to Dr. Eric Saslow, a board-certified child neurologist, in October 1997, when claimant was eight years old, for treatment of Tourette's syndrome and mood disorder. Dr. Saslow treated claimant from 1997 to 2005. Based on a review of his notes from 1997 through 1999, Dr. Saslow testified that his treatment focused on tics and Tourette's syndrome; there were co-morbidities, but the tics were his and claimant's family's primary concern. Dr. Saslow repeatedly changed claimant's medications and dosages, but the medications never completely controlled the symptoms of claimant's Tourette's syndrome. Claimant's tics became less prominent over the years, but claimant's behavioral and other issues remained. At no point during his eight years of treating claimant did Dr. Saslow consider that claimant might have autism. (Ex. SA30.) He testified that his and claimant's family's focus was so much directed to addressing claimant's tics that he failed to recognize claimant's autism. He testified that he believes autism was and is claimant's major disability.

16. The school district again assessed claimant in December 1999, when he was in the fifth grade. Claimant's condition was listed as "Emotionally Disturbed." His December 14, 1999, IEP report noted that claimant's eligibility was due to his "broad-based behavior disorder, which includes: ADHD, OCD, ODD, Tourette's and Anxiety, along with a significant emotional disturbance." It also noted that claimant's anxiety about math causes him to display frequent motor and vocal tics, that he perseverates on "playground issues," that he "does not complete school assignments without consistent teacher prompting and intervention," and that his "behavior severely impacts his school performance." (Ex. SA10.) The report recommended referring claimant to Orange County Mental Health (OCMH) for services. Dr. Mary Parpal, a Service Agency psychologist, testified at hearing that OCMH does not serve children based on a diagnosis of autism; it serves children with disruptive behavior disorders, mood disorders, anxiety disorders, personality disorders, and other severe emotional disorders.

17. Between the fall of 2002 through the summer of 2005, claimant attended eighth through tenth grade at the Mardan Educational Center, a state-certified school for special education students. During his years at Mardan, claimant received therapy from Dudley Wiest, Ph.D., a psychologist. Dr. Wiest eventually recommended that claimant be seen by Perry Passaro, Ph.D., a psychologist, who diagnosed claimant as having schizoaffective disorder. Dr. Passaro's efforts to treat claimant's condition through cognitive behavioral therapy (CBT) were ineffective.

18. On June 7, 2005, an assessment team from claimant's school district prepared a Cognitive Evaluation Report. The report notes weaknesses in claimant's cognitive fluency, executive processing, short-term memory, and working memory that, according to Dr. Parpal's testimony, are not inconsistent with mental retardation or fifth category.[2] As of his June 9, 2005 IEP, claimant was working toward obtaining a certificate of completion rather than a diploma (Ex. SA20); he was having difficulty in all academic subjects, as would an individual eligible under the fifth category, according to Dr. Parpal. Dr. Parpal testified, however, that claimant had some areas of strength as well, and that overall his testing was more indicative of a learning disability than fifth category.

19. In August 2005, claimant's parents decided to place him at Boys Town, an intensive residential placement in Nebraska for children with serious emotional, social, academic, and behavioral problems. (Ex. SA22.) Claimant began attending school there in September 2005. At Boys Town, claimant continued to require prompting and assistance to engage with his peers. Although Boys Town ultimately trained claimant to greet adults and maintain some level of eye contact with them, claimant continued to fail to initiate social interactions with peers and to have difficulty completing tasks without prompting and performing basic skills, such as balancing a checkbook. His September 27, 2006 IEP (Ex. SA23) reflects objectives and accommodations that are, according to Dr. Parpal, consistent with autism or fifth category. In December 2006, claimant claimed he was having suicidal and homicidal ideations; he was hospitalized at the Immanuel Medical Center and eventually released from the Boys Town program. The hospital staff did not perform any assessment to determine whether some condition other than ADHD, a learning disability, or Tourette's syndrome, such as autism, was present. (Ex. SA26.)

20. Claimant's father testified that claimant had no friends in elementary school; he was invited to birthday parties only through the intervention of his parents. Claimant did not like being in Catholic school for first and second grade. He would not play cooperatively, and the school informed claimant's parents that it could not meet claimant's needs and that he should attend school elsewhere. Claimant's father testified that claimant has not advanced past sixth grade math; he cannot divide or multiply. After Boys Town, claimant never returned to school.

21. Over the years, claimant's IEPs noted various behavioral, emotional, social, communications, transition, and learning issues, and established related goals, such as respecting personal space and speaking appropriately. None of claimant's teachers or education professionals ever recorded on any report that claimant had autism, and the school district did not refer claimant to a regional center.

---

[2] "Fifth category" refers to a category of developmental disability eligible for regional center services, defined at Welfare and Institutions Code section 4512, subdivision (a), as comprising "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation," but that do "not include other handicapping conditions that are solely physical in nature."

22. When claimant returned home from Boys Town, he resumed treatment with Dr. Passaro, who continued to provide him with CBT. Dr. Passaro noted that claimant had a history of delusions, hallucinations, and paranoid ideation that were controlled by antipsychotic medication. Dr. Passaro continued to diagnose claimant with schizoaffective disorder and Tourette's syndrome; he did not diagnose claimant with autism.

23. Dr. Passaro referred claimant to I. Lee Gislason, M.D., a psychiatrist, to work with claimant after his return from the treatment team in Nebraska. Dr. Gislason noted, in his December 22, 2006 initial evaluation report, some difficulty understanding claimant's rapid speech, and reviewed Boys Town records describing claimant's poor peer relationships and academic struggles. (Ex. SA28.) Cristiana N. Motet-Grigoras, M.D., testified that Dr. Gislason has informed her that it was his opinion when he saw claimant that claimant has autism, but that it was not his practice to change a diagnosis given by a referring psychologist so he did not formally diagnose claimant with autism. In his initial evaluation report, Dr. Gislason wrote that "[i]t was not for me to specifically change medications or treatment plan."

24. Claimant's father testified that claimant no longer displays many symptoms of Tourette's syndrome. He also testified as follows: None of the treatment or medications claimant received for Tourette's syndrome or for the various diagnoses claimant has received from his health professionals and from his various schools had any effect on his social functioning with peers, his regard for self-care, or his ability to follow directions. He continues to flap his hands and rock his upper body. Claimant did, however, learn to look people in the eye and shake their hand after drilling in this exercise at Boys Town. Boys Town asked claimant's parents to remove him because it had not been able to help him; his teacher said he should live in a group home.

25. In July 2007, claimant was hospitalized at St. Joseph's Hospital for severe depression after failing to take his medication for several days. (Ex. SA29.) Claimant remained in therapy with Dr. Passaro until August 2008, when Dr. Passaro informed the family that claimant should be placed in a supported community environment. Claimant's father testified that Dr. Gislason, to whom Dr. Passaro referred claimant, also told claimant's father to apply for Service Agency services for claimant, saying that claimant required structure and a group home setting.

26. While attempting to find an appropriate residential placement for claimant, his parents learned of the Center for Adaptive Learning in Concord. During a visit to the Center, claimant's parents were told that the Center would accept claimant, that they should ask a regional center to evaluate claimant's eligibility, and that claimant would likely be eligible for regional center funding because he presented in a manner similar to many of the Center's residents. Clients living at the Center have roommates and receive vocational training. Personnel at the Center informed claimant's parents that residents of the Center generally remain there for most or all of their lives and that the cost of such an extended stay, at a rate of approximately $3,000 per month, is prohibitive for most families without regional center funding.

Dr. Saslow's October 2008 Consultation

27. After their visit to the Center for Adaptive Learning, claimant and his parents consulted with Dr. Saslow on October 31, 2008, regarding whether claimant should be diagnosed with pervasive developmental disorder not otherwise specified (PDD-NOS), which might make claimant eligible for regional center services. Claimant's parents informed Dr. Saslow of the cost of placing claimant in the Center. Dr. Saslow had not seen claimant since 2005. Dr. Saslow recommended that claimant's parents talk with an attorney with expertise in developmental disability cases, and agreed to "write any report needed." (Ex. SA30.) He testified that he would "absolutely not" have changed his diagnosis simply based on claimant's parents' request, but that he was fallible and had "missed the mark" in diagnosing claimant. Dr. Saslow testified that when he reflected on claimant's parents' suggestion that claimant might have autism, "it made perfect sense to me. It's not a matter of my simply wanting to accommodate the parents. . . . This was my best clinical judgment, and explains so much of what [claimant] has been." He testified that he chose to diagnose claimant with "autism spectrum disorder" in order to bypass distinguishing between autism, Asperger's syndrome, and PDD NOS.

Assessments by Dr. Kaler and Dr. Motet-Grigoras in 2008 and 2009

28. In December 2008, when claimant was 20 years old, he was assessed by Sandra R. Kaler, R.N., Ph.D., a clinical and developmental psychologist, registered nurse, and nurse practitioner. Dr. Kaler met variously with claimant and his parents on four occasions in December 2008, spending about four hours with claimant. She obtained a detailed developmental history from claimant's parents, reviewed the records in claimant's file, made observations of claimant's behaviors, and administered the following diagnostic instruments: Wechsler Adult Intelligence Scale, 4th Edition (WAIS-IV); Wechsler Individual Achievement Test, 2nd Edition (WIAT-II); Beery-Buktenica Developmental Test of Visual Motor integration (Beery-VMI), Autism Diagnostic Observational Schedule, Module IV (ADOS-IV); Sentence Completion Test-Adolescent Version (SCT-A); Beck Depression Inventory (DBI), Rorschach, Thematic Apperception Test (TAT); Vineland Adaptive Behavior Scales, 2nd Edition (Vineland-II); Adaptive Behavior Assessment System, 2nd Edition (ABAS-II); she also administered an informal test of social know-how.

29. In her Psychological Evaluation, dated December 26, 2008, Dr. Kaler observed that claimant was a "friendly young man with initial marked gaze-aversion. He gives the overall impression of a much younger boy and is quite childlike." She noted poor articulation in his speech, and that his "thought processes were perseverative. He had difficulty with the understanding of many age-appropriate words," and "was unable to comprehend words at the 7th grade level." (Ex. SA31; C3.) Dr. Kaler concluded in her evaluation:

> [Claimant] is a . . . clearly developmentally delayed 20 year, 1 month old boy who is functioning in the low-average range cognitively overall, with strengths in crystallized intelligence and marked delays in fluid intelligence. . . .
>
> [Claimant] is demonstrating a developmental disability consistent with autism. [He] has a qualitative impairment in reciprocal/social interaction, a delay in deviance in language and restricted repertoire of activities and behaviors. His disability is impacting him significantly in all areas of independence. This includes economic self sufficiency, self care, self direction, learning and capacity for independent living. . . .
>
> . . . What was most notable was that [claimant] is so socially impaired. . . . Formal testing does not evidence psychiatric disabilities as an underlying basis for [claimant's] difficulties and his difficulties are not solely psychiatric or educational in nature. Rather, it is this examiner's impression that [claimant's] underlying difficulties are *social* and *cognitive*. As he has gotten older, he has been unable to make developmental gains. [Claimant] should be viewed as a person with a significant developmental disability.

(Ex. C3; italics in original.) On the ADOS-IV administered to claimant, Dr. Kaler obtained communication and reciprocal social interaction scores satisfying the threshold for autism. Among her recommendations, Dr. Kaler wrote that claimant "meets criteria as a person with autism" and "also meets criteria as a person in Fifth Category, as his significant deficits in self care, independence, learning and self direction make him unable to function anywhere near his chronological age." She wrote that she "strongly supports [claimant's] placement in a residential treatment center focusing on developing social and self-help skills," and "the use of a job coach in a routinized job that accesses his cognitive areas of strength."

30. Dr. Kaler testified at hearing as follows.

a. Claimant lives in the world as a much younger person would, as a result of a developmental disability. Claimant's executive functioning ability is quite low, as reflected in his IQ, ABAS, and ADOS results. This might be confused with ADHD, but claimant is attentive during testing, and persistent. He just has difficulties "putting it all together." This cannot be explained by a psychiatric disorder, claimant did not present with depression, Tourette's syndrome is not associated with this deficit, and there was no evidence of schizophrenia, thought disorder, or childhood disintegrative disorder. Claimant has autism.

b. The diagnosis of autism was missed early in claimant's life, and claimant's records do not address his early development, possibly because claimant's parents

and treating health professionals were focused on Tourette's syndrome. Dr. Patterson did not use any instrument designed for obtaining parental information about claimant's early development, and his discussion with claimant's father was too brief to obtain a thorough history.

c. Persons assessing or treating claimant looked at particular symptoms and diagnosed numerous disorders. But only one diagnosis, autism, consistently covers claimant's deficits. Claimant had social and cognitive deficits not explained by psychological disabilities. OCD prevents an individual from controlling ego-dystonic thoughts; claimant probably does have obsessive thoughts, but many are ego-syntonic, e.g., he likes thinking about video games. This is explained by autism, and is typical of high-functioning autistic individuals.

d. An autistic individual may also have Tourette's syndrome, or mood disorder, or OCD.

e. The ADOS corresponds directly to the DSM IV criteria for autism. Because claimant's ADOS results are in the autistic range, he necessarily meets the DSM IV criteria. And under the DSM IV, if you meet the requisite number of criteria for a diagnosis, that diagnosis applies. Dr. Patterson's use of the Gilliam test, a checklist administered to parents, does not change her opinion. The best testing for autism is administration of the ADOS in conjunction with a careful early history and tests of adaptive functioning. This distinguishes between psychological disabilities and autism.

f. The criteria for autistic disorder under the DSM IV require six or more items from criteria category A, including at least two from category A(1) (qualitative impairment in social interaction), and one each from categories A(2) (qualitative impairments in communication) and A(3) (restricted repetitive and stereotyped patterns of behavior, interests, and activities); two from criteria category B (delays or abnormal functioning prior to the age of 3 years); and, under criterion C, the disturbance should not be better accounted for by Rett's Disorder or Childhood Disintegrative Disorder. Claimant meets the following criteria under the DSM IV: A(1)(b) (failure to develop appropriate peer relationships) and (c) (lack of spontaneous seeking to share interests); A(2)(c) (stereotyped and repetitive use of language) and d (lack of appropriate play); A(3)(a) (encompassing abnormal preoccupation with stereotyped and restricted patterns of interest) and (c) (stereotyped and repetitive motor mannerisms); B (delays in social interaction and symbolic or imaginative play), and C.

g. Claimant requires services designed for persons with developmental disabilities, or he will keep floundering. He needs a case coordinator, opportunities for social recreational experiences that are supervised and that give him a sense of self-efficacy, social skills training, medication management, a sheltered work setting with a job coach who understands autism and can help claimant develop independence, and an environment where others are learning the same skills.

31. From November 14, 2008, to January 16, 2009, Dr. Motet-Grigoras, a board-certified child and adolescent psychiatrist, also performed a psychiatric evaluation of claimant. Dr. Motet-Grigoras spent about eight hours with claimant and reviewed his early developmental history. After having done so, as reflected in her Psychiatric Evaluation Report dated January 16, 2009, Dr. Motet-Grigoras diagnosed claimant with autistic disorder, Tourette's syndrome, and depression NOS. She has continued to treat claimant on a weekly basis.

32. Dr. Motet-Grigoras testified, and her report reflects, that she had spoken with Dr. Lee Gislason, who had treated claimant after a referral from Dr. Passaro, and that Dr. Gislason had informed her that he believed that claimant has "an Autistic Disorder of the high functioning type." (Ex. SA32.) She further testified as follows.

a. Claimant is substantially disabled with respect to social skills, communication, self-care, and verbal and receptive language. Claimant satisfies the DSM IV TR criteria for autism, specifically A(1)(b), (c), and (d); (2)(b), (c), and (d); (3)(a), (b), and (c); B; and C.

b. The Service Agency ascribed each of the relevant symptoms separately to different disorders, thereby missing the appropriate diagnosis of autism. That is not, according to Dr. Motet-Grigoras, the correct way to use the DSM IV TR.

c. Claimant does not meet the criteria for OCD; his perseverative behaviors are consistent with autism. He has difficulty with transitions and with receptive language, and he is unable consistently to view things from another person's perspective. Clinicians who have not worked with high functioning autistic individuals often miss the diagnosis, as they did with claimant. She reviewed the symptoms on which claimant's treating clinicians based their various diagnoses—ADHD, OCD, mood disorder, and others—and, taken as a whole, those symptoms support a diagnosis of autistic disorder.

d. Claimant's treatments have not benefitted him; for instance, claimant has made very little progress with his cognitive behavior therapy. Claimant still has significant difficulties in all aspects of adaptive functioning; those difficulties are attributable to autism, and most people with only Tourette's syndrome are not so impaired. Claimant's inability to play cooperatively while in school was not explained by his Tourette's syndrome.

e. Claimant has not functioned better than an individual with mental retardation, and requires services afforded to individuals with mental retardation, such as in the areas of daily living activities and employment.

Application to the Service Agency

33. In January 2009, claimant's parents asked the Service Agency to provide services to claimant. RCOC's intake service coordinator, Marilyne Thompson, met with claimant and his father on January 30, 2009, and conducted a social assessment. In her

report, Ms. Thompson recommended that the Service Agency should obtain "all available medical, educational, psychological reports and evaluations" and review those records to determine claimant's eligibility.

The Service Agency's Trans-disciplinary Assessments of Claimant and Determination of Ineligibility

34. On May 21, 2009, the members of the Service Agency's eligibility team, including its psychologist, Dr. Parpal, and its pediatric neurologist and Medical Director, Dr. Peter Himber, based on a review of claimant's records, each determined, without meeting with claimant, that claimant was not eligible for regional center services.

35. The Service Agency conducted a second eligibility assessment of claimant on April 20, 2009. Dr. Parpal, Dr. Himber, and Ms. Thompson met with claimant and his mother to determine claimant's eligibility under autism and under the "fifth category." The trans-disciplinary team report reflects that, during the meeting, claimant did not display atypical body or hand movements or types of play, or perseveration, and that he made satisfactory eye contact, maintained appropriate personal space, showed some interest in the team's thoughts and opinions, and readily and appropriately responded to questions in speech that was easy to understand. The trans-disciplinary team concluded, as reflected in their report, that claimant:

> is substantially disabled in the following areas of major life activity: Self-Direction, Capacity for Independent Living and Economic Self-Sufficiency. While [claimant] is substantially disabled in these areas, his disabilities are not due to a developmental disability. Rather they are due to other non-eligible psychiatric diagnoses. [Claimant] is not eligible for Regional Center services.

(Ex. SA4.)

36. Dr. Himber testified at hearing that as part of his assessment he reviewed claimant's history, including reports from Dr. Baren, Placentia-Yorba Linda Unified School District, Boys Town Schools, Immanuel Medical Center, Dr. Gislason, Dr. Motet-Grigoras, and Dr. Saslow. He testified that the meeting lasted for about one and one-half hours, that he spent no time with claimant alone, that he typically performs his neurological exam in front of all present, and that he administered no standardized instruments to claimant. He also testified that he has never seen claimant outside that one meeting and that he did not contact any of the physicians whose reports and records he had reviewed. Dr. Himber testified that, as reflected in the Transdisciplinary Assessment Report, his observations were consistent with his review of the records and claimant's previous diagnoses of Tourette's syndrome, OCD, ADHD, and an unspecified mood disorder. He testified that claimant's social interaction difficulties are best explained by psychiatric diagnoses, which overshadow any developmental disability. He conceded that the school district reports he reviewed did not

indicate that autism had been considered and rejected as a diagnosis. He also conceded that an individual may have autism, obsessive-compulsive tendencies, Tourette's syndrome, and depression, and that the incidence of depression in high-functioning autistic individuals is high. But he testified that he believes it to be extremely unlikely that as many professionals as have seen claimant would miss a diagnosis of autism.

37. Dr. Parpal testified that the Service Agency's decision to deny eligibility was largely based on the Service Agency's doubts that all of the professionals who had seen claimant over the course of his life could have erroneously failed to diagnose him with autism. She testified that she reviewed claimant's records and that they did not indicate autism or fifth category. She testified that she spent 30 minutes with claimant at the assessment meeting, and that claimant did not present with the symptoms of a person with autism or fifth category, but was articulate and socially related, and made eye contact. She did not administer any standardized instruments, or make an independent determination as to whether claimant satisfied the criteria for OCD, ADHD, or schizoaffective disorder, but rather relied on claimant's treating physicians—Dr. Baren, Dr. Saslow, Dr. Gislason, and Dr. Passaro—for those diagnoses. She did not speak with claimant regarding his obsessions and compulsions, and did not speak with claimant's father, with anyone at Boys Town, or with Dr. Kaler or Dr. Grigoras. She did not doubt claimant's mother's reporting that claimant was isolated, lonely, had a long history of difficulty with peers, engaged in hand-flapping and rocking, and had difficulties with transitions. She noted claimant's referral to Orange County Mental Health by his school district, but testified that OCMH does treat some children with autism who are regional center clients, though it does so only rarely if autism is the sole diagnosis. She testified that if a child has a developmental disability, school districts generally refer the child to a regional center; claimant's school districts did not refer claimant to a regional center. She also testified that the communications deficits attributed by Dr. Kaler to autism could be explained by conditions other than autism, and that the ADOS instrument, which Dr. Kaler administered, can result in false positives. She testified that Dr. Kaler's finding that claimant never played with other children as a toddler could be attributed to claimant's shyness, and is also contradicted by some information in claimant's record. She concluded that claimant's substantial disabilities are not related to an eligible condition.

Dr. Saslow's July 2009 Letter

38. Dr. Saslow again reviewed claimant's case, this time in light of the reports and diagnoses of Dr. Motet-Grigoras and Dr. Kaler. He notified the Service Agency's trans-disciplinary team that he had changed his diagnosis to autism spectrum disorder by letter dated July 13, 2009. (Ex. C1.) In that letter, Dr. Saslow wrote that claimant's "difficulties with socialization, learning, anxiety, and self-care have dominated the clinical picture in recent years and are consistent with developmental disabilities related to autism." His letter concluded:

> In summary, [claimant] is a 20-year-old young man with Tourette syndrome; an autism spectrum disorder (PDD-NOS); severe generalized anxiety, and demonstrated incapacity to

> maintain basic self-care and hygiene nor has he been able to sustain any kind of employment. He is oblivious to the passage of time and behaves like a ship without a rudder. He is "future blind." [Claimant] is not remotely capable of being self-sufficient. He needs intensive assistance in adaptive living and basic time management.

39. Dr. Saslow testified at hearing as follows. He had been "remiss" in failing to see that claimant had autism, and had "missed the big picture." Claimant has mood, attention, and anxiety issues, but these are areas of symptomatic expression. Ascribing them primarily to psychiatric disorders rather than a developmental disability misses the key to understanding why claimant functions as poorly as he does. He is not mentally retarded, yet he is in many ways non-functional—this is best understood in the context of a pervasive developmental disability, not anxiety, Tourette's syndrome, or ADHD. Autism is the most harmonious and plausible explanation for why claimant is still so limited in what he is able to do. Based on what he knows now, with the benefit of the reports of Dr. Kaler and Dr. Motet-Grigoras, and based on his knowledge of claimant over the years, he would amend his diagnosis to autism. "I can say confidently that he's autistic;" a primary diagnosis of autism is inescapable. There are many co-morbidities, but autism is "the apex of the pyramid," the basis for claimant's inability to live a normal life.

Dr. Patterson's Evaluation of Claimant and the Service Agency's Further Finding of Ineligibility

40. The Service Agency engaged Robert Patterson, Ph.D., a psychologist, to evaluate claimant. Dr. Patterson reviewed portions of claimant's historical record and, on September 17, 2009, met with claimant and his father. He spent under three hours with claimant, and spoke with claimant's father for about 15 minutes. Dr. Patterson utilized various cognitive achievement, language, adaptive, and social-emotional functioning instruments and conducted autism screening by use of the Gilliam Autism Rating Scale-2nd Edition (GARS-2), the Social Communication Questionnaire (SCQ), and theory of mind tasks.

41. Reporting his findings in a Psychological Report dated October 14, 2009, Dr. Patterson concluded that claimant has Tourette's disorder, a mood disorder not otherwise specified, ADHD not otherwise specified, and OCD. His diagnosis of ADHD not otherwise specified was based, Dr. Patterson testified, solely on his review of claimant's historical record; he observed no symptoms of ADHD. He testified that he observed behavior consistent with Tourette's syndrome, and that medications for Tourette's syndrome do not always reduce or eliminate the symptoms. He testified that he diagnosed claimant with mood disorder not otherwise specified because claimant was depressed and that diagnosis frequently accompanies Tourette's syndrome.

42. Dr. Patterson testified that he considered whether claimant fell within the "fifth category" of eligibility under the Lanterman Act, and that he did not see claimant functioning as an individual with mental retardation. Dr. Patterson had claimant and his father complete the Adaptive Behavior Assessment System-2nd Edition (ABAS-II) to assess claimant's adaptive functioning. Claimant's overall General Adaptive Composite score was "at the 1st percentile as seen by his father, which is in the retarded range of Adaptive Functioning." Claimant also saw himself at the first percentile. But Dr. Patterson found that claimant performed at an average level on the Street Survival Skills Questionnaire, which differed from the ABAS-II results that were based on the perceptions of claimant and his father. Dr. Patterson concluded that claimant "clearly has the knowledge of Adaptive Functioning." He testified that results of the Woodcock Johnson test and the Wechsler were low but borderline, "so, you know, who knows?"

43. Dr. Patterson also concluded that, based on the results of the autism screening instruments he used, claimant is not autistic. (Ex. SA5.) He testified that claimant's social skills limitations were consistent with Tourette's syndrome, that Dr. Kaler's use of the ADOS for diagnostic purposes was inappropriate, and that characteristics that Dr. Kaler attributed to autism were more appropriately attributed to Tourette's syndrome. Dr. Patterson also disagreed with Dr. Motet-Grigoras's conclusion that claimant is autistic; he would attribute claimant's deficits to Tourette's syndrome. He testified that it is difficult to determine the cause of claimant's hygiene issues and lack of self-direction. He agrees with the conclusions of the Service Agency's transdisciplinary team that claimant is substantially disabled in self-direction and capacity for independent living, but not with its conclusion that claimant is substantially disabled in economic self-sufficiency; he feels that with behavioral therapy claimant's anxiety about work can be alleviated. Dr. Patterson acknowledged that an individual may have autism and Tourette's syndrome, OCD, ADHD, or depression. He testified that he does not believe that practitioners have become more adept over the past 18 years at recognizing autism in children. Reviewing December 1999 reports from the Placentia-Yorba Linda School District (Exs. C5, C6, C7) at the hearing, which he had not reviewed prior to writing his report, Dr. Patterson testified that claimant's inability to play cooperatively and work independently might be attributed to causes other than autism, such as ADHD. He testified that claimant's perseveration as described in these reports might be attributed to OCD, and his standing too close to others might be attributed to Tourette's' syndrome, though he acknowledged that both behaviors are also consistent with autism.[3]

44. Based on Dr. Patterson's evaluation, the Service Agency again determined that claimant is ineligible for regional center services. (Factual Finding 4.)

45. In questioning the validity of claimant's recent diagnosis of autism, the Service Agency points out, not unpersuasively, that:

[3] Drs. Patterson, Kaler, and Motet-Grigoras agreed that there was no basis for Dr. Passaro's diagnosis of schizoaffective disorder.

a. for the first 20 years of his life not one of claimant's treating health professionals and teachers ever reported a belief that claimant might have autistic disorder, but diagnosed and treated claimant, albeit with varied degrees of success, for a number of other conditions, including Tourette's syndrome and various psychiatric disorders;

b. claimant's school district did not refer claimant to a regional center for services and supports for autism, but did refer him to Orange County Mental Health;

c. the Service Agency's recent assessments conclude that claimant does not have autism; and

d. Dr. Saslow, who treated claimant for eight years for Tourette's syndrome and mood disorder, did not mention the possibility of autism until claimant's parents informed him of their need for regional center funding for claimant's placement in the Adaptive Learning Center.

46. But the essential difficulty for the Service Agency's position is the even more persuasive evidence that claimant satisfies the DSM IV TR criteria for autistic disorder. That evidence is not controverted; it is supplemented by evidence that claimant also has Tourette's syndrome and has experienced and continues to experience depression and anxiety. The recent assessments and reports by Dr. Kaler and Dr. Motet-Grigoras, which taken together include a detailed analysis of claimant's developmental history and the use of diagnostic instruments directly relevant to the issues to be decided here, are more persuasive than the record reviews and evaluations performed on behalf of the Service Agency. Evidence that claimant met the DSM IV TR criteria for autism prior to age three, while not strongly corroborated, is nevertheless of sufficient weight to establish the relevant criteria for autistic disorder under the DSM IV TR. Although the health care professionals and educators working with claimant throughout his childhood and adolescence failed to diagnose autism, based on all the evidence presented claimant has always displayed characteristics that would have justified such a diagnosis. The parties agree that claimant is substantially disabled. Whether symptoms of claimant's other disabilities may overlap with those of claimant's autism, or whether claimant has been misdiagnosed with respect to some of those other disabilities, the weight of the evidence establishes that claimant has autistic disorder, that autism has been a primary cause of claimant's substantial disability in three areas of major life activity since before claimant was 18 years old, and that the condition will continue indefinitely. The evidence also shows that claimant requires treatment similar to that required for individuals with mental retardation.

LEGAL CONCLUSIONS

1. Cause exists to grant claimant's request for regional center services, as set forth in Factual Findings 1 through 46, and Legal Conclusions 2 through 4.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that he is eligible for government benefits or services. (*See* Evid. Code, § 115.)

3. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) To establish eligibility for regional center services under the Lanterman Act, claimant must show that he suffers from a developmental disability that "originate[d] before [he] attain[ed] 18 years old, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for [him]." (Welf. & Inst. Code, § 4512, subd. (a).) "Developmental disability" is defined to include mental retardation, cerebral palsy, epilepsy, autism, and "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (*Id*.)

4. Claimant established by a preponderance of the evidence that he has a qualifying diagnosis of autism. (Factual Findings 5-46.) Claimant also established by a preponderance of the evidence that he qualifies for regional center services under the fifth category of eligibility, in that he requires treatment similar to that required by individuals with mental retardation. (Factual Findings 18, 19, 29, 30, 32, 42, and 46; see *Samantha C. v. State Dept. of Developmental Services* (2010) 185 Cal.App.4th 1462, 1492-1494.)

ORDER

Claimant Brian B.'s appeal is granted; the Regional Center of Orange County's decision denying claimant's request for regional center services is reversed.

DATE: June 14, 2011

_____

HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.